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Supreme Court of Nebraska.

PULLMAN PALACE CAR CO. v. LOWE.

Sleeping-car companies, are liable to the same responsibilities and obligations as innkeepers, in respect to passenger's goods. Such a rule is required for the security of travelers and their protection against dishonesty, as well as negligence.

Error from District Court of Douglas County.

Howard B. Smith, for plaintiff.

A. Steere, Jr., for defendant.

MAXWELL, J., Dec. 17, 1889. This action was brought by the defendant in error against the plaintiff in error, to recover the value of an overcoat, which, it is alleged, was lost or stolen from a Pullman car in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The Court was requested to make special findings in the case, which it did, as follows :

"I find, as the facts proven on the trial of this case, that on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs on the Wabash & St. Louis Railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in the sleeping-car attached to the train which left St. Louis on the evening of that day. That the train left St. Louis at 8:25 p. m. That a short time before the train left plaintiff entered the sleeping-car, and, upon doing so, delivered his coat to the porter of the car, who took it, and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth. That, shortly after the train started, the sleeping-car conductor passed through the car, and took up the ticket which had been purchased by the plaintiff, and gave him in exchange therefor another ticket, known as a 'berth-ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping berth for occupation by the plaintiff. That the next morning, when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there, where it had been placed the evening before by the porter, and where he (the plaintiff) left it. That plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning. That plaintiff went out to breakfast at the regular breakfast station, which occupied him about fifteen minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes, smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing. That he immediately called the attention of the conductor of the sleeping-car to the fact, who, after first disclaiming any responsibility for the care of the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of \$50. I also find that the conductor left the car at the breakfast station, and went to his breakfast at the

same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about twenty-five minutes' absence of plaintiff from his berth in sleeping-car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"Conclusion of Law: I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter. I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75."

The rules of the company were also introduced in evidence in its behalf, but, as the defendant in error had no notice of them, they do not enter into the case.

The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employes of the company. We find no case exactly in point, and as the question is a new one, not only in this State, but, to a great extent, in the other States of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite for hire all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers: "We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare." The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper.

In the very able and carefully prepared briefs of the attorney for the plaintiff in error, we find the following objections to charging the company with the liability of an innkeeper. He says: It undertakes (1) to furnish accommodations to "first-class" passengers exclusively; (2) to furnish toilet accommodations to such passengers; (3) to furnish a certain specified seat or bed to such a passenger; (4) to furnish a servant who will respond to all proper demands on his service by such passengers, promptly and politely; but to do these four things for a limited time, which is agreed upon between it and each passenger in advance. It does not make even this agreement with all those who travel by rail. It makes this agreement with first-class passengers exclusively.

The distinction between an innkeeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stephens* (1867), 2 Daly (N. Y.) 15, from pages 21 to 26, inclusive. After quoting the definition of an "inn," as given by Chief Justice OAKLEY in *Wintermute v. Clark* (1851), 5 Sandf. (N. Y.) 247, to wit:

"Where all who come are received as guests, without any previous agreement as to the duration of their stay or as to the terms of their entertainment."

And from *Willard v. Reinhardt* (1853), 2 E. D. Smith (N. Y.) 148, in which the distinctions between a boarding-house and an inn were declared to be this:

"In a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, but in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract."

And from *Carpenter v. Taylor* (1856), 1 Hilt. (N. Y.) 195, as follows:

"Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns."

It will be seen that a distinction is attempted to be drawn between the sleeping-car company and an inn-keeper, because only a certain class can occupy such cars, viz., persons holding first-class tickets, whereas, at an inn, all who conduct themselves properly may be entertained.

There is great confusion in the decisions as to what constitutes an "inn." In *Calye's Case* (1584), 8 Coke, 32, it was held that inns were instituted for passengers and wayfaring men. In another case, an "inn" is defined to be a house where the traveler is furnished all he has occasion for while on the way: *Thompson v. Lacy* (1820), 3 Barn. & Ald. 283. Bouvier defines "innkeeper" to be

"The keeper of a common inn for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation."

The innkeeper is bound to take in and receive all travelers and wayfaring persons, and entertain them, if he can accommodate them, and the same is true of a sleeping-car company, as to all passengers holding a first-class ticket. The fact that persons holding second or third-class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping-car, does not enter into the case, any more than that a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping-car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must for hire entertain those asking for entertainment.

A more difficult question is to properly define the word "guest" at an hotel. Parsons defines a "guest" to be one who comes without any bargain for time, remains without one, and may go when he pleases: 2 Pars. Cont. 151. This is not sufficiently comprehensive to be a proper definition. In *Walling v. Potter* (1868), 33 Conn. 183, s. c. 9 AMERICAN LAW REGISTER N. S. 618, the Supreme Court of Connecticut defines the word "guest" as follows:

"A guest is one who patronizes an inn as such." But it is said that none but a traveler can be a guest at an inn, in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.' It is used in a broad sense, to designate those who patronize inns. In *Wintermute v. Clark* (1851), 5 Sandf. (N. Y.) 247, the Court say that, in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment, for all who choose to visit it, is the true definition of an inn. These definitions are really in harmony with

each other. Webster defines a traveler as ‘one who travels in any way.’ Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such.”

This, we think, is a correct definition of the word “guest,” and we adopt the same. *Berkshire Woolen Co. v. Proctor* (1851), 7 Cush. (Mass.) 417: In the latter case, the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. See, also, *Hull v. Pike* (1868), 100 Mass. 495; *Norcross v. Norcross* (1865), 53 Me. 163; *Pinkerton v. Woodward* (1867), 33 Cal. 557; and a valuable article in 14 Cent. Law J. 206; *Hancock v. Rand* (1879), 17 Hun (N. Y.) 279. In *Dunbier v. Day* (1882), 12 Neb. 597, this Court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A “lodger” is defined by Bouvier to be

“One who inhabits a portion of a house of which another has the general possession and custody.”

There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a “guest” as distinguished from a mere “lodger.” Generally, however, a lodger is one who, for the time being, has his home at his lodging-place: *Phillips v. Evans* (1876), 64 Mo. 17. The rule, under the decisions, is not of universal application, but nearly so: *Phillips v. Henson* (1877), 30 Moak, Eng. R. 19; *Thompson v. Ward* (1871), L. R. 6 C. P. 327; *Bradley v. Baylis* (1881), L. R. 8 Q. B. Div. 195; *Ness v. Stephenson* (1882), L. R. 9 Q.

B. Div. 245; *Hickman v. Thomas* (1849), 16 Ala. 666; *Ullman v. State* (1876), 1 Tex. App. 220.

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger, on entering a sleeping-car as a guest,—because that is what he is in fact,—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employes, are *infra hospitium*, and are at the company's risk.

The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service: *Mason v. Thompson* (1830), 9 Pick. (Mass.) 283.

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn. In both cases, the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars on the train, and at stations may go out on the platform. A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler and to the company, and is a circumstance in the case. If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves

might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this, whether it is stolen at night or in the day-time; yet in many of the large inns of this country, at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car, no one would contend that it differed from an inn in its accommodations. In this State, meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence but also against the dishonest practices, of the agents or employes of the sleeping-car company, requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations.

The judgment is therefore affirmed. The other judges concur.

The decision in the principal case, by which a sleeping car company is made liable, as an innkeeper, for the goods of a traveler or passenger, stands alone among the many authorities to be found upon the question of the liability of these companies, all the previous cases having shown that sleeping cars are not inns, nor their owners innkeepers.

Such being the case, it is proposed in this annotation to show what an

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inn is, and who is an innkeeper; the differences that exist between the keeper of a common inn and the owner of one of these companies; also, to consider whether such companies can properly be subjected to the stringent liabilities attaching to innkeepers, or whether they are not to be considered in the light of ordinary bailees for hire, and therefore liable for ordinary negligence, in not keeping a reasonable watch over the passenger, and his personal belongings,

while he is asleep; and further, to examine the question of liability of steam-boat owners as innkeepers.

An Inn, as defined by BAYLEY, J., in *Thompson v. Lacy* (1820), 3 Barn. & Ald. 286, is a "house where the traveler is furnished with everything he has occasion for while on his way," and by BEST, J., in the same case, as, "a house, the holder of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received."

In *Winternute v. Clarke* (1851), 5 Sandf. (N. Y.) 247, OAKLEY, C. J., said it was "a public house of entertainment for all who chose to visit it, which is the true definition of an inn."

Chancellor KENT, in his Commentaries (Vol. II, p. 595), defines it thus: "It must be a house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable compensation." "If a person," the same learned writer goes on to say, "lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large indiscriminately, it is not a common inn."

The various definitions are thus treated by the Court in *Bonner v. Welburn* (1849), 7 Ga. 307: "The leading ideas which pervade them all, are, that inns are houses for the entertainment of all travelers. * * For the entertainment of all travelers, at all times and seasons, who may properly apply, and behave with decency; and that as guests for a brief period, and not as lodgers or boarders, by contract, by a season."

Mr. Justice STORY, in his work on Bailments (§ 475), thus defines an innkeeper: "The keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses

and attendants, for a reasonable compensation."

In *Kisten v. Hilderbrand* (1848), 9 B. Mon. (Ky.) 72, Chief Justice MARSHALL defined an innkeeper as, "a person who makes it his business to entertain travelers and passengers, and provide lodging and entertainment for them, their horses and attendants"; and further; after stating that they are liable as such although they have no provision for horses; says: "It must be his business to entertain travelers and passengers." See to the same effect *Southwood v. Myers* (1868), 3 Bush. (Ky.) 681.

The case of *Bonner v. Welburn*, (*supra*), went so far as to hold that, a hotel at a watering place, where there was a medical spring, open during the summer and fall for the accommodation of visitors resorting thither for their health or pleasure, was not an inn or house of entertainment, but was in the nature of a boarding-house.

From the above it is clear that, in order to render a person liable as an innkeeper, he must keep a common inn, for the lodging and entertainment of the public generally and indiscriminately; and that, he must make such his business. This view is further supported by *Lyon v. Smith* (1843), 1 Morris (Iowa) 184, in which case MASON, C. J., said: "To be subject to the same responsibilities attaching to innkeepers, a person must make tavern keeping, to some extent, a regular business, a means of livelihood. He should hold himself out to the world as an *innkeeper*. It is not necessary that he should have a sign, * * * provided he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation." And further, by *Carter v. Hobbs* (1863), 12 Mich., 56, where it is distinctly laid down that the party must act in the capacity of an

innkeeper, that the relationship of innkeeper and guest must exist; in short, he must keep an inn. To the same effect, *Howth v. Franklin* (1858), 20 Tenn. 798; *Ingalsbee v. Wood* (1862), 36 Barb. (N. Y.) 462; *Walling v. Potter* (1868), 35 Conn. 183; s. c. 9 AMER. LAW REGISTER 618. See also *Carpenter v. Taylor* (1856), 1 Hilt. (N. Y.) 193; where the Court held that, in order to charge a party as an "innkeeper," the premises must be kept as an inn for the accommodation of travelers. The opinion of the Court in *Cromwell v. Stephens* (1867), 2 Daly (N. Y.) 15, further shows that, in order to render a person liable as an innkeeper, meals must be furnished. In this case DALY, P. J., says: "A mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn."

The duties cast upon an innkeeper are such, that, in pursuing his daily business he is bound, not only to lodge, but also, to feed his guest, and to receive and care for his goods; and further, unless otherwise provided by statute, his liability is unrestricted in amount; so he cannot select his guests, but is bound to lodge and entertain all who apply in a proper manner, in return for which he has a lien upon the property of the guest for his charges. Moreover, an innkeeper is an insurer of the safety of his guest's goods: *Mason v. Thompson* (1830), 9 Pick. (Mass.) 283; *Berkshire Woolen Co. v. Proctor* (1851), 7 Cush. (Mass.) 417; *Dunbar v. Day* (1882), 12 Neb. 597; in which case it was said that, it seems to be the fair result of all the cases, that the innkeeper is responsible for all the property of every kind which the traveler finds it convenient to have about him as a traveler.

Now all these duties cannot fairly be said to attach to a sleeping-car company, and especially to such, as the one in

the principal case, where there was no provision made to feed the passengers on board, although if such provision were made it might more reasonably be urged that such companies were liable as innkeepers. Yet in the opinion, MAXWELL, J., says, "Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn." It is however manifest, that there are very material differences between the two, for a person occupying a berth in a sleeping car cannot protect his person and goods by bolt and lock from the thief; and these distinctions are perhaps nowhere better shown, than by BROWN, J., in *Blum v. Southern Pullman Palace Car Co.* (1876), 1 Flipp. (U. S. Crt. Rp., W. D. Tenn.) 500, wherein it was sought to hold the defendants liable as innkeepers for money stolen from out of the passenger's waistcoat pocket which he had placed under his pillow on retiring for the night. Holding the company not liable as innkeepers the learned judge said: "There are good reasons for not extending such liability to the proprietors of a sleeping car. 1st. The peculiar circumstances of sleeping cars are such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection. 2d. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has even asserted

such lien, and it is presumed that none ever exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to pre-payment. 3d. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive them. 4th. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guest, and unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that too usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging. 5th. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail is however under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose. 6th. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employes of the train to collect fares and control its movements. 7th. The sleeping car can not even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of the rules and regulations."

Again, the distinctions are further shown in *Welch v. The Pullman Palace Car Company* (1874), 1 *Sheld. (N.Y.)* 457, where the company was held not liable as an innkeeper; *SHELDEN*, J., said, "The liability of an innkeeper arises out of facts which do not arise in

this case. He cannot lawfully refuse to receive guests to the extent of his reasonable accommodation, nor can he impose unreasonable terms upon them. The necessities of the traveler require these just rules to be adopted. As a compensation for the responsibility thus incurred, he has a lien upon all the property of the guest in the inn for all his expenses there. * * The defendant could not be compelled to receive and entertain passengers, however amenable it might be upon its contract with the carrier, and it had no lien for the price of the accommodations."

So in the case of *Pullman Palace Car Co. v. Smith* (1874), 73 Ill. 360; s. c. 15 AMERICAN LAW REGISTER 95, where it appeared that the company had no place to store valuables, and that their agents were instructed to receive no parcels, valuables or money, and receive no pay for baggage or valuables of any kind, but only to take pay for the berths, and had a notice on their ticket, placing all at the owner's risk; on an action being brought by the passenger to recover a large sum of money which had been stolen, while he was asleep, from out of his inside vest pocket, which he had placed under his pillow previous to retiring for the night, the Court held that the company was not liable as an innkeeper. *SHELDEN*, J., in delivering the opinion of the Court, (after citing various authorities upon the nature of inns and innkeepers) added, "From the authorities already cited, it is manifest that this Pullman Car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company that of an innkeeper. It does not, like an innkeeper, undertake to accommodate the boarding public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class, those who have already paid their fare, and are provided with

a first class ticket entitling them to ride to a particular place. * * The not furnishing entertainment is a lack of one of the features of an inn. * * The custody of the goods of the traveler is not, as in the case of an innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made. The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and entrust his goods and baggage into the custody of the innkeeper. But here the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car, and there were easy methods, within his reach, by which both money and baggage could be safely transported, and there was no necessity of imposing this duty and liability on appellant [the company]. * * The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied there is no precedent or principle, for the imposition of such a liability upon appellant."

These cases show, most lucidly, the points of distinction between the two classes of persons, and the principles, therein set forth, pervade all the other decisions upon the subject, except the one in the principal case. It does appear somewhat singular, that none of the cases were either called to the attention of the Court, or cited by the judge in his opinion. That such is the case, however, one is led to presume from the opinion, wherein MAXWELL, J., says, "We find no case exactly in point, and as the question is a new one, not only in this State but to a great ex-

tent, in the other States of the nation, we are practically without precedents to aid us, and must adopt such rules as may seem just and equitable."

There would seem however to be ample authority to show that such is not the case, and, that the weight of such authority is decidedly in favor of holding them liable, as ordinary bailees for hire (for negligence, in not exercising ordinary care, and keeping proper watch over the passenger and his personal belongings while he is asleep), and not as innkeepers.

Against this theory, however, the remarks of SHELDEN, J., in *Pullman Palace Car Co. v. Smith*, (*supra*), may perhaps be urged, inasmuch as, after dealing with the question from the innkeeper's stand-point, as before shown, he would seem to be of opinion that they could not be held liable in any way, for he says, "It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses by collusion, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee [the passenger], assumed the exclusive custody of his money, adopted his own means for its safe keeping, by himself, and, we think his must be the responsibility of its loss."

It does not seem just or right that such companies should be held responsible for whatever amount persons, knowing the situation in which they are placed, may choose to carry about their persons, whether for their own convenience or otherwise, without regard to the reasonableness or unreasonableness of the amount. Yet it is reasonable that they should be held responsible for

negligence in not keeping sufficient watch, and exercising ordinary care in guarding his person, and such property as the passenger may reasonably carry with him. This view the authorities support.

The main object in providing such cars is surely to permit the passenger to sleep, thereby inducing him to depart from the ordinary car, provided by the railroad company, wherein if he sleeps, he does so at his own risk, and to partake of the ease and comfort afforded him by a berth in one of their own cars where he is invited to sleep, and not only to sleep but to disrobe in order that he may make himself so far as possible as comfortable as he would be at home. Thus, it cannot be said that, while in this state, they expect him to look after his own person and property. They receive compensation for the privilege of sleeping, and therefore impliedly undertake to keep watch, and use ordinary care in respect to his person and property.

This view is supported by the case of *Palmeter v. Wagner* (1875), decided in the Marine Court of New York, but only reported in 11 Alb. L. J. 149, where the Court held that, while such companies were not insurers, innkeepers nor transporters, yet they were bound to use due diligence in keeping away disturbers, and must keep reasonable watch to protect a passenger, and his property about his person, during sleep.

Again, by *Pullman Palace Car Co. v. Gaylord* (1884), 6 Ky. Repr. 279; s. c. 23 AMERICAN LAW REGISTER (N. S.) 788, where the action was brought to recover the value of a scarf-pin stolen from a passenger in one of the company's cars, the company being held liable for a breach of duty in not keeping a reasonable watch over the passenger and his property, RICHARDS, J., remarked—"While * * * the stringent liability of an innkeeper which the dis-

tinguished Chief Justice COLERIDGE has said does not 'stand on mere reason, but on custom, growing out of a state of society no longer existing,' is not to be applied to the owners of sleeping cars, it does not follow that they assume no duties or liabilities. These cars are in themselves an invitation to the traveling public to enter and protect themselves against the weariness of a long journey by disrobing and sleeping. The passenger in buying and the company in selling the ticket contemplate that this privilege will be improved. The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property. The faithful performance of this undertaking is the limit of its duty in this respect. Its breach must be the foundation of every action seeking to charge the company with the loss of articles the passenger has with him upon the car."

The case of *Lewis v. New York Central Sleeping Car Company* (1887), 143 Mass. 267; s. c. 26 AMERICAN LAW REGISTER (N. S.) 359, further illustrates the above principles. In that case, there were two actions, one in contract alleging that the company, in consideration of the purchase of the ticket entitling the passenger to be carried in a sleeping car, undertook to provide him with a berth in such car, and to see that such car was properly guarded, and that his personal baggage and effects were protected while he was asleep, but that through the negligence of their agents certain monies were stolen. The other action was in tort, and alleged the same, and claimed damages. In delivering the opinion of the Court, which held the company liable as for a breach of duty, that is, for negligence, MORTON, C. J., said, "A sleeping car company holds itself out to the world as furnishing safe and

comfortable cars; and when it sells a ticket it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping; all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself, or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any other step to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car, to guard him and the property he has with him from danger from thieves or otherwise. The law implies the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company; and the decided weight of authority supports it."

The case of *Pullman Car Company v. Gardner* (1883), 3 Penny. (Pa.) 78, while conceding that the company was not liable as an innkeeper, clearly shows that "a reasonable and proper degree of care is imposed on the company," for the Court said, "The main object in taking passage in such a car is to permit the passenger to sleep." The Court almost made it an imperative duty for such companies to keep a watchman in the car, saying, "Unless a watchman be kept constantly in view of the centre aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act."

The case of *Dargan v. Pullman Palace Car Co.* (1885), 2 Willson

(Texas Ct. App. Civil Cas.,) 607, takes the law as well settled that sleeping car companies are not to be regarded as innkeepers, nor subjected to their onerous liabilities in respect of the property of those enjoying their accommodation, and holds that, "it is their duty to exercise ordinary care for the security of passengers' valuables," and that a failure to use ordinary care, proportionate to the danger reasonably to be apprehended, would be negligence which would reasonably render such a company liable for the loss of the passenger's property (per WILLSON, J.). Pointing out that greater danger exists at night, while the passenger is asleep, than in the day time, when he is awake and can care for himself, the Court dwells upon the invitation to sleep, and the implied agreement to take reasonable care of the guest's effects while he is asleep.

Again, in *Root v. New York Central Sleeping Car Co.* (1887), 28 Mo. App. 199, THOMPSON, J., says, "The settled law is, that a sleeping car company is not an insurer of the baggage of a passenger, but that its liability, at most, is that of a bailee for hire. In the case of a loss of the passenger's baggage or belongings, it is therefore, liable, if at all, only on the ground of negligence, and in order to be so liable, it must have been negligent in the performance of some duty which it assumed to perform for the passenger. That duty, so far as adjudged cases seem to have gone, is, that it will maintain in the car reasonable watch during the night, while the passenger is asleep." He even goes further than this and says, "that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of the necessary baggage and belongings as he cannot conveniently take

with him nor watch himself while he is absent from his berth in the wash-room, preparing his toilet after arising in the morning." And further, that such duty extended to "the extent of baggage reasonably necessary." See to the same effect *Wilson v. Baltimore & Ohio Ry. Co.* (1888), 32 Mo. App. 682.

The case of *Scaling v. Pullman Palace Car Co.* (1886), 24 Mo. App. 29, further supports this view, LEWIS, P. J., saying, "The gist of the action is negligence. * * * Sleeping car companies are not liable to the responsibilities of common carriers, or of innkeepers. But there is a peculiar responsibility implied in every contract of the company with a passenger." *Bevis v. Baltimore & Ohio Ry. Co.* (1887), 26 Mo. App. 19, in which the Court said, "there must be reasonable care in keeping watch while the plaintiff slept," further supports these views.

In *Woodruff Sleeping Car and Parlor Coach Co. v. Diehl* (1882), 84 Ind. 474, the Court held that the company was not liable either as an innkeeper, or as a common carrier, but was liable for negligence, HOWK, J., saying, "While it may be true that a sleeping car company is not liable as an innkeeper or a common carrier, yet it cannot be held that the company is not responsible to an occupant of a berth in its car for the loss of his personal goods and money, resulting from such negligence, as was shown by the facts in this case." And further, after quoting the language used in *Crozier v. Boston etc., Steamboat Co. (infra)*, as follows: "In such a case, the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake,

and to entrust his person and whatever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward for the comfort thus afforded, will themselves exercise. Certainly few persons would dare trust themselves to sleep in a state-room on board a steamboat unless they supposed those in charge of it were under an obligation to exercise the utmost vigilance," added, "this language it seems to us, is as applicable to the occupant of a berth in a sleeping car as to the occupant of a state-room on a steamboat."

The case of *Pfaelzer v. The Pullman Palace Car Co.* (1877), 4 W. N. C. (Pa.) 240, further shows that the gist of the action is negligence, and although the company was not in this instance sought to be made liable as an innkeeper, but as a common carrier, it is here cited to support the contention that they can only be made liable as ordinary bailees for hire. In this case the plaintiff had two valises, which on entering the car were taken from him by the porter; plaintiff left the car for a few moments, and on returning found one was missing. He sued the company as common carrier, but the Court held it was not liable as such, and that in order to recover, negligence must be shown. To the same effect, *Whitney v. Pullman Palace Car Co.* (1887), 143 Mass. 243. The case of *Pullman Palace Car Co. v. Pollock* (1887), 69 Tex. 120, further supports the contention, that they are not liable as common innkeepers, the Court saying, "It is evidently true it [the company] did not assume * * * the liabilities which the innkeeper assumes to guests."

The recent case of *Pullman Palace Car Co. v. Matthews*, decided in the Supreme Court of Texas, November 1, 1889, further supports the cases of *Pullman Palace Car Co. v. Pollock* and

Lewis v. New York Central Sleeping Car Co., supra.

So far, the cases, to which attention has been drawn, have related solely to actions brought against sleeping car companies strictly so called, but inasmuch as the question, whether or not the liability of an innkeeper attaches to the owner of a steamboat, is so closely connected with the subject that an examination of the cases upon this side of the question seems necessary.

There would seem to be more reason for holding the owner of a steamboat to the responsibilities of an innkeeper than in holding a sleeping-car company, purely so called, thereto. In a steamboat, a person occupying a state-room, has the means of protecting himself by lock and bolt against the thief; and a cloak room is provided; he is also furnished with meat and drink upon the premises, in the same manner as at an inn. Yet here, the courts have differed in their opinions.

In the case of *Steamboat Crystal Palace v. Vanderpool* (1855), 16 B. Mon. (Ky.) 302, a case in which a theft had been committed, of articles from the passenger's state-room in the night, CRENshaw, J., says, "Steamboats are, in some respects, analogous to inns, and it would greatly promote the ease, comfort, and safety of the traveling community if their owners were held responsible to the same extent that innkeepers are; but, so far as we know, they have never been held accountable upon the principles applied to innkeepers." He regarded them however as common carriers and held them not liable, as the articles were not entrusted to their safe keeping.

In *Macklin v. New Jersey Steamboat Co.* (1869), 7 Abb. Pr. (N. Y.) 229; s. c. 9 AMERICAN LAW REGISTER 239, which was also a case of theft, DAILY, J., applied the law upon the question of the liability of innkeepers to the case of

a steamboat, "in which the traveler is carried, lodged and fed," and may "with some liberty of speech, be called a traveling inn." Here again the Court found the defendants liable as common carriers of passengers.

Crozier v. The Boston, New York and Newport Steamboat Co. (1871), 43 How. Pr., (N. Y.) 466, was also a case of larceny of articles from the plaintiff's stateroom in the night, although he had taken the precaution to lock the door before retiring. In this case CARTER, J. C., as referee says, "I perceive in it all the elements of that form of liability which, under the circumstances analogous, attaches to an innkeeper. The rule of law applicable to such a case, I think to be this,—that if any of the articles or money which the passenger properly has with him in the state-room are stolen, the presumption is, that the theft was in consequence of the default of the carrier and that this presumption can be rebutted only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God, or of the public enemy. All the considerations of public policy, which have operated to fix upon innkeepers the rigorous liability above indicated, apply, as it seems to me, with increased force to the case of carriers of passengers under these circumstances."

Thus the cases above cited apply the strict rules of law relative to innkeepers, to the owners of steamboats, while, in the following the contrary opinion is held.

In *Clark v. Burns* (1875), 118 Mass. 275, defendants were sued, for the value of a watch stolen from plaintiff's state-room, as common carriers, with counts charging them with negligence and charging them as innkeepers. Here GRAY, C. J., said: "The liability of an innkeeper extends

only to goods put in his house as keeper of a public house, and does not attach to a carrier who has no house, and is engaged only in the business of transportation. The defendants carrying passengers and goods for hire, were not innkeepers." He further held that in order to enable plaintiff to recover, negligence must be proved.

The view taken in this case is supported by the case of *American Steamboat Co. v. Bryan* (1887), 3 W. N. C. (Pa.) 528, where it was held that they could not be held as innkeepers; negligence must be proved.

These last two cases are supported by the opinion of RICHARDS, J., in *Pullman Palace Car Co. v. Gaylord* (*supra*), wherein, in speaking of a sleeping car, he says: "It could no more be said that a sleeping car was an 'inn on wheels' than that a steamboat was an 'inn on water.'"

The fact, that such personal belongings of the traveler as he may reasonably carry with him are lost in, or stolen from, a sleeping car, does not relieve the railroad company from responsibility therefor. This was decided by the case of *Kinsley v. Lake Shore and Michigan Southern R. R. Co.* (1878), 125 Mass. 54, where the plaintiff, a traveler on the defendant's road, occupied a berth in a sleeping car owned by another company. On stopping at a depot for the purpose of taking dinner, plaintiff asked an employe whether his baggage would be safe if left in such car, and on being informed that it would, left it, and went to dinner. On his return he found the car had been taken off the train, and was told he would find his baggage in another car on the train. Boarding such car, he found some portion missing, and brought an action against the railroad company. In the opinion of the Court, GRAY, C. J., says: "The fact that the car was not

owned by the defendant, but was used on its road under a contract with other parties who furnish conductors and servants to take charge of such car, there being no evidence that the plaintiff knew of that contract, or had any notice that the car was not owned by the defendant and under its exclusive control, could not affect the measure of the defendant's liability to the plaintiff." The same result was reached in the case of *Pennsylvania Co. v. Roy* (1880), 102 U. S. 452, where personal injuries were received by the plaintiff, riding in a sleeping car, through the falling of a berth. Holding the railroad company liable, HARLAN, J., remarks, "The law will not permit a railroad company, engaged in the business of carrying people for hire, through any device or arrangement with a sleeping car company whose cars are used by, and constitute a part of the train of the railroad, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to carry." See to the same effect, *Louisville, Nashville & Great Southern R. R. Co. v. Katzenberger* (1886), 16 Tenn. 380.

Reference may here be made to the annotation to the cases of *Walling v. Potter* (1868), 9 AMER. LAW REG. 618; *Pullman Palace Car v. Smith* (1874), 15 Id. 95; and *Lewis v. New York Central Sleeping Car Co.* (1887), 26 Id. 359, as further supporting the view here taken.

This annotation has, as far as possible, been confined to the question of holding sleeping car companies liable as innkeepers, and has not touched, or if so, very slightly, upon the question of their liability as common carriers of passengers, inasmuch as that question did not arise, nor was it even mooted in the principal case.

ERNEST WATTS.